FOR ARGUMENT

No. 91-1160

FILED
SEP 4 1992
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

A. J. ARAVE,

Petitioner,

v.

THOMAS EUGENE CREECH,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

RESPONDENT'S BRIEF ON THE MERITS

CLIFF GARDNER *
GARDNER & DERHAM
900 North Point, Suite 450
San Francisco, CA 94109
(415) 922-9404

CLAUDE M. STERN
NOSSAMAN, GUTHNER, KNOX
& ELLIOTT
50 California Street, 34th Floor
San Francisco, CA 94111

* Counsel of Record

BEST AVAILABLE COPY

QUESTION PRESENTED

Does the Idaho Supreme Court's construction of Idaho's "utter disregard for human life" aggravating factor adequately channel the sentencer's discretion in imposing the death penalty where it does not require proof of any particular fact or circumstance, but instead requires the sentencer to make a decision based on wholly subjective criteria?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iv
STATEMENT OF THE CASE	1
SUMMARY OF ARGUMENT	4
ARGUMENT	6
I. THE COURT OF APPEALS CORRECTLY HELD THAT IDAHO'S "UTTER DISREGARD" AGGRAVATING FACTOR WAS UNCONSTITUTIONAL	6
A. The *Osborn* Construction Is Unconstitutional Because It Contains No Reference To Any Circumstance Capable Of Objective Determination	6
1. The Eighth Amendment requires that an aggravating factor guide the sentencer's discretion by reference to circumstances capable of objective determination	6
2. The *Osborn* construction of the "utter disregard" aggravating factor contains no reference to any circumstance capable of objective determination and is unconstitutional	13
B. Idaho Cases Establish That The Utter Disregard Aggravating Factor Provides No Guidance To The Sentencer	19
C. Under Any Interpretation, There Is Insufficient Evidence To Support The Utter Disregard Aggravating Factor In This Case	25
D. Because The Idaho Supreme Court Did Not Engage In Harmless Error Analysis Or Appellate Reweighing, A Remand Is Required	27
CONCLUSION	31

TABLE OF AUTHORITIES

CASES

	Page
Amoros v. State, 531 So.2d 1256 (Fla. 1988)	17
Arnold v. State, 236 Ga. 534, 224 S.E.2d 386 (1976)	11, 15
Boggs v. Bair, 892 F.2d 1193 (4th Cir. 1989), *cert. denied*, 495 U.S. 940 (1990)	8
Brown v. State, 473 So.2d 1260 (Fla. 1985), *cert. denied*, 474 U.S. 1038 (1985)	17
Cannady v. State, 427 So.2d 723 (Fla. 1983)	17
Cartwright v. Maynard, 822 F.2d 1477 (10th Cir. 1987)	*passim*
Clemons v. Mississippi, 494 U.S. 738 (1990)	*passim*
Cline v. Frink Dairy Co., 274 U.S. 445 (1927)	18
Connally v. General Construction Co., 269 U.S. 385 (1926)	18
Champlin Refining Co. v. Corporation Commission of Oklahoma, 286 U.S. 210 (1932)	7
Cramp v. Board of Public Instruction, 368 U.S. 278 (1961)	7
Creech v. Arave, 947 F.2d 873 (9th Cir. 1991)	*passim*
Furman v. Georgia, 408 U.S. 238 (1972)	6
Godfrey v. Georgia, 446 U.S. 420 (1980)	*passim*
Gregg v. Georgia, 428 U.S. 153 (1976)	7
Hance v. State, 254 Ga. 856, 268 S.E.2d 339 (1980), *cert. denied*, 449 U.S. 1067 (1980)	12
Harmon v. State, 527 So.2d 182 (Fla. 1988)	17
Herzog v. State, 439 So.2d 1372 (Fla. 1983)	17
Jackson v. Virginia, 443 U.S. 307 (1979)	25
Kelley v. State, 486 So.2d 578 (Fla. 1986), *cert. denied*, 479 U.S. 871 (1986)	17
Lankford v. Idaho, —— U.S. ——, 111 S.Ct. 1723 (1991)	22
Lanzetta v. New Jersey, 306 U.S. 451 (1939)	20
Lewis v. Jeffers, 497 U.S. 764, 110 S.Ct. 3092 (1990)	7, 25
Mann v. State, 420 So.2d 578 (Fla. 1982), *cert. denied*, 469 U.S. 1181 (1985)	17
Maynard v. Cartwright, 486 U.S. 356 (1988)	*passim*
McKinney v. State, 579 So.2d 80 (Fla. 1991)	16, 17

TABLE OF AUTHORITIES—Continued

	Page
Moore v. Clarke, 904 F.2d 1226 (8th Cir. 1990), *cert. denied*, —— U.S. —— (1992)	8, 9
Newlon v. Armontrout, 885 F.2d 1328 (8th Cir. 1989)	9
Parker v. Dugger, 111 S.Ct. 731 (1991)	29
People v. Davis, 794 P.2d 159 (Colo. 1990)	12
Re Petition of State for Writ of Mandamus, 433 A.2d 325 (Del. 1981)	11
Ponticelli v. State, 593 So.2d 483 (Fla. 1991)	17
Proffitt v. Florida, 428 U.S. 242 (1976)	8
Proffitt v. Wainwright, 685 F.2d 1227 (11th Cir. 1982)	8
Pulley v. Harris, 465 U.S. 37 (1984)	7
Rogers v. State, 511 So.2d 526 (Fla. 1987), *cert. denied*, 484 U.S. 1020 (1988)	16
Routly v. State, 440 So.2d 1257 (Fla. 1983), *cert. denied*, 468 U.S. 1220 (1984)	17
Shell v. Mississippi, —— U.S. ——, 111 S.Ct. 313 (1990)	8
Smith v. Goguen, 415 U.S. 566 (1973)	6, 20
Sochor v. Florida, —— U.S. ——, 112 S.Ct. 2114 (1992)	19, 28, 29, 30
State v. Aragon, 690 P.2d 293 (Idaho 1984)	21, 24
State v. Beam, 710 P.8d 526 (Idaho 1985)	22
State v. Breton, 562 A.2d 1060 (Conn. 1989)	12
State v. Brogdon, 457 So.2d 616 (La. 1984) (same), *cert. denied*, 471 U.S. 1111 (1985)	12
State v. Charboneau, 774 P.2d 299 (Idaho 1989)	18, 22
State v. Creech, 670 P.2d 463 (Idaho 1983)	*passim*
State v. David, 468 So.2d 1126 (La. 1985), *cert. denied*, 476 U.S. 1130 (1986)	11
State v. English, 367 So.2d 815 (La. 1979)	11
State v. Fain, 774 P.2d 252 (Idaho 1989), *cert. denied*, 493 U.S. 917 (1989)	21
State v. Fetterly, 710 P.2d 1202 (Idaho 1985), *cert. denide*, 479 U.S. 870 (1986)	21
State v. Gibson, 675 P.2d 33 (Idaho 1983), *cert. denied*, 468 U.S. 1220 (1984)	22
State v. Lankford, 781 P.2d 197 (Idaho 1989), *cert. denied*, —— U.S. ——, 110 S.Ct. 423 (1990)	21

TABLE OF AUTHORITIES—Continued

	Page
State v. Leavitt, 775 P.2d 599, 608 (Idaho 1989), *cert. denied*, 493 U.S. 923 (1989)	24
State v. Leavitt, 822 P.2d 523 (Idaho 1991)	24
State v. Osborn, 631 P.2d 187 (Idaho 1981)	*passim*
State v. Osborn, 663 P.2d 1111 (Idaho 1983)	21
State v. Paradis, 676 P.2d 31 (Idaho 1984), *cert. denied*, 468 U.S. 1220 (1984)	22
State v. Paz, 798 P.2d 1 (Idaho 1990), *cert. denied*, —— U.S. ——, 111 S.Ct. 375 (1990)	21
State v. Pizzuto, 810 P.2d 680 (Idaho 1991), *cert. denied*, —— U.S. ——, 112 S.Ct. 1268 (1992)	21, 24
State v. Rook, 304 N.C. 201, 283 S.E.2d 732 (1979), *cert. denied*, 455 U.S. 1098 (1982)	12
State v. Searcy, 798 P.2d 914 (Idaho 1990)	23
State v. Sonnier, 402 So.2d 650 (La. 1981), *cert. denied*, 463 U.S. 1229 (1983)	11
State v. White, 395 A.2d 1082 (Del. 1978)	11, 12
State v. Wood, 648 P.2d 71 (Utah 1982), *cert. denied*, 459 U.S. 988 (1982)	12
United States v. L. Cohen Grocery Co., 255 U.S. 81 (1921)	7
Stringer v. Black, 112 S.Ct. 1130 (1992)	28, 29, 30
Walton v. Arizona, 110 S.Ct. 3047 (1990)	7, 8, 14, 15, 16
Wilson v. State, 295 Ark. 682, 751 S.W.2d 734 (1988), *modified*, 295 Ark. 692, 752 S.W.2d 762 (1988)	12
Zant v. Stephens, 462 U.S. 862 (1983)	7, 28
FLORIDA STATUTE	
Section 921.141(5)(i)	16, 17
IDAHO CODE	
Section 18-4006	23
Section 19-2515(c)	29
Section 19-2515(e)	29
Section 19-2515(g)(6)	4, 6
Section 19-2515(g)(8)	26
UNITED STATES CONSTITUTION	
Eighth Amendment	*passim*

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

No. 91-1160

A. J. ARAVE,
Petitioner,

v.

THOMAS EUGENE CREECH,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENT'S BRIEF ON THE MERITS

STATEMENT OF THE CASE

On May 13, 1981, Thomas Creech and David Jensen were inmates in the maximum security unit at the Idaho Correctional Facility. At 2:00 that afternoon, Jensen attacked Mr. Creech by swinging a sock full of batteries at him. (RT 1984 at 15-20, 26-27.)[1] Mr. Creech defended himself, punching Jensen and taking the batteries away from him. Fifteen minutes later, Jensen once again at-

[1] "RT 1984" refers to the Reporter's Transcript covering the February 1984 guilty plea withdrawal hearing. "RT 1981" refers to the Reporter's Transcript covering the August 1981 change of plea hearing. "RT 1982" refers to the Reporter's Transcript covering the January 1982 sentencing hearing. "ER" refers to the Excerpt of Record filed in this case.

tacked Mr. Creech, this time slashing him with a razor blade attached to a toothbrush. He slashed Mr. Creech in the stomach, the arms and the face. Mr. Creech swung the sock of batteries at Jensen, hitting him in the head until he collapsed and died. (RT 1984 at 26-33.) Before being taken to the hospital in a wheelchair, and immediately after the fight, Mr. Creech referred medical aid to Jensen. (RT 1984 at 34; ER 156-157.)

Mr. Creech was charged with first degree murder on June 8, 1981, and pled not guilty. (JA 16-17, 19.) On August 26, 1981, Mr. Creech wrote a letter from his prison cell to Judge Robert Newhouse, advising the judge that he wished to "accept the responsibility of taking another life" by changing his plea to guilty. (RT 1981 at 35; ER 121.) Judge Newhouse received the letter and set a change of plea hearing for August 28, 1981. (RT 1981 at 35; JA 22-23.)

At the time of the hearing, and as the federal district court later found, the state had not yet provided discovery and defense counsel had not yet investigated the case or "discovered Creech may have been guilty only of manslaughter in the killing." (JA 150.) Similarly, the federal district court found that defense "counsel had not discussed with Creech the specific elements of the offense with which he was charged or possible defenses to those charges." (JA 149-150.) Because defense counsel had not yet investigated the case, and was not in a position to advise Mr. Creech, he requested a five-day continuance. (RT 1981 at 40; JA 23.) The court denied this request and, over defense counsel's objection, accepted Mr. Creech's uncounseled guilty plea to the capital charge. (JA 22-25; RT 1981 at 39-40.)[2]

[2] The propriety of accepting an uncounseled guilty plea to a capital case is the subject of Mr. Creech's Cross-Petition for Writ of Certiorari, No. 91-7348. Although this Court ordered the Idaho Solicitor General to file a response, there has not yet been a ruling on the cross-petition.

After a January 11, 1982 sentencing hearing the state trial court issued findings of fact. The trial court explicitly found that Jensen had attacked Mr. Creech without provocation and that Mr. Creech was initially justified in defending himself:

> [T]he defendant did not instigate the fight with the victim, but the victim, without provocation, attacked him. [Defendant] was initially justified in protecting himself. (JA 32.)

The state trial court also found, however, that Mr. Creech's actions went "well beyond self-defense" and evidenced an "excessive violent rage." (JA 33.)

In sentencing Mr. Creech to death, the trial court relied on Idaho's "utter disregard" aggravating factor, finding that "[b]y the murder, or circumstances surrounding its commission, the defendant exhibited utter disregard for human life." (JA 34). As required by Idaho law, the trial court then weighed the aggravating factors against the mitigating factors. (JA 35.) Finding that "the mitigating circumstances do not outweigh the gravity of the aggravating circumstances" the trial court imposed a sentence of death. (JA 35.)

On February 25, 1983, the Idaho Supreme Court vacated the death sentence and ordered a new sentencing hearing at which the trial court would select a "just and approprate" sentence. (JA 38-39.) At the second sentencing hearing, however, the trial court refused to allow Mr. Creech to present any evidence in rebuttal or mitigation. (JA 49-75.) Instead, the court simply re-read its earlier findings, including the uttter disregard factor, into the record. (JA 50-55.)

On appeal, the Idaho Supreme Court affirmed the trial court's utter disregard finding without elaboration, holding that "the evidence clearly supports the trial court's findings of aggravating and mitigating circumstances." *State v. Creech*, 670 F.2d 463, 470 (Idaho 1983). That

court then performed proportionality analysis, comparing this case to other capital cases, and concluded that the death sentence was proportionate. *State v. Creech*, 670 P.2d at 476.

After being denied relief in the state courts, Mr. Creech filed a habeas corpus petition in federal district court. The federal district court denied the petition. Mr. Creech appealed to the Court of Appeals.

On October 16, 1991, a panel of the Ninth Circuit consisting of Judges Hall, Wiggins and Beezer reversed and ordered that Mr. Creech be resentenced, holding that the Idaho courts had violated the Eighth Amendment in completely precluding Mr. Creech from presenting any mitigating evidence at his sentencing hearing. *Creech v. Arave*, 947 F.2d 873, 881-882 (9th Cir. 1991). In addition, the Court of Appeals held that Idaho's "utter disregard" aggravating factor was unconstitutionally vague. *Creech v. Arave*, 947 F.2d 873, 882-885 (9th Cir. 1991). On January 14, 1992, petitioner sought a Writ of Certiorari in this Court, which was granted on June 15, 1992 and modified on August 12, 1992.[3]

SUMMARY OF ARGUMENT

Idaho Code Section 19-2515(g)(6) provides that anyone convicted of murder is eligible for the death penalty if he exhibits "utter disregard for human life." In *State v. Osborn*, 631 P.2d 187 (Idaho 1981), the Idaho Supreme Court recognized that this phrase was unconstitutionally vague, but attempted to give it a proper limiting construction by defining it as "reflective of acts or circumstances surrounding the crime which exhibit the highest, the utmost, callous disregard for human life, i.e., the cold-

[3] In light of the Court's August 12 order, respondent understands that the issue presented in this case is the constitutionality of Idaho's "utter disregard" aggravating factor. Accordingly, respondent will not address those portions of petitioner's brief which do not pertain to this issue.

blooded, pitiless slayer." 631 P.2d at 200-201. The state trial court sentenced Mr. Creech to die, in part, by relying on this factor. (JA 53.)

The Court of Appeals properly held that the *Osborn* construction was itself unconstitutionally vague. *Creech v. Arave*, 947 F.2d at 882-885. As the Court of Appeals noted, for an aggravating factor to fulfill its constitutional purpose of guiding the sentencer's discretion and avoiding the arbitrary imposition of the death penalty, it must require proof of some fact or circumstances which is capable of objective determination. This result not only follows inexorably from principles of law this Court has long established, but it is consistent with the uniform weight of authority throughout the country as well.

The limiting construction placed upon the utter disregard factor by *Osborn* is purely subjective and does not provide the sentencer with the specific and detailed guidance essential to a capital punishment scheme. The Idaho Supreme Court's own conclusion that the evidence supported this aggravating factor does not cure the sentencer's reliance on this aggravating factor. In applying the utter disregard aggravating factor, the Idaho Supreme Court has refused to hold that any particular fact must be present to establish the factor, but instead has simply focused on all the circumstances surrounding the crime. *It has never reversed a single utter disregard finding.* Thus, neither the *Osborn* formulation nor the Idaho Supreme Court's applications of that factor provide a principled way to distinguish those cases in which the utter disregard factor is found from those in which it is not.

ARGUMENT

I. THE COURT OF APPEALS CORRECTLY HELD THAT IDAHO'S "UTTER DISREGARD" AGGRAVATING FACTOR WAS UNCONSTITUTIONAL.

The Idaho courts have sentenced Mr. Creech to death, in part, by relying on Idaho Code Section 19-2515(g)(6) and finding that he killed with an "utter disregard" for life. Petitioner does not dispute that this language is facially unconstitutional. Petitioner argues that the Court of Appeals erred in refusing to accede to the "subjective but workable statutory definition" fashioned by the Idaho Supreme Court. Pet.Br. at 17. Petitioner's argument must be rejected.

A. The *Osborn* Construction Is Unconstitutional Because It Contains No Reference To Any Circumstance Capable Of Objective Determination.

1. *The Eighth Amendment requires that an aggravating factor guide the sentencer's discretion by reference to circumstances capable of objective determination.*

In *Godfrey v. Georgia*, 446 U.S. 420 (1980) this Court made clear that under the Eighth Amendment "[a] capital sentencing scheme must . . . provide a 'meaningful basis for distinguishing the few cases in which [the penalty] is imposed from the many cases in which it is not.'" 446 U.S. at 428, *quoting Furman v. Georgia*, 408 U.S. 238, 313 (1972) (White, J., concurring). *Accord Lewis v. Jeffers*, 497 U.S. 764, 110 S.Ct. 3092, 3099 (1990). The Court has "insisted that the channeling and limiting of the sentencer's discretion in imposing the death penalty is a fundamental constitutional requirement for sufficiently minimizing the risk of wholly arbitrary and capricious action." *Maynard v. Cartwright*, 486 U.S. 356, 362 (1988). *See Smith v. Goguen*, 415 U.S. 566, 573 (1973). This process also serves to "'make rationally reviewable the process for imposing a sentence of death.'"

Lewis v. Jeffers, 110 S.Ct. at 3099; *Godfrey v. Georgia*, 446 U.S. at 428.

A state may rely on the presence of certain aggravating factors to accomplish this "constitutionally necessary narrowing function." *Pulley v. Harris*, 465 U.S. 37, 50 (1984). In order to achieve this purpose, however, such factors must "genuinely narrow the class of persons eligible for the death penalty and . . . reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder." *Zant v. Stephens*, 462 U.S. 862, 877 (1983).

Given the "constitutionally necessary narrowing function" of aggravating factors, and in order to ensure that they fulfill the "fundamental constitutional requirement [of] sufficiently minimizing the risk of wholly arbitrary and capricious action" this Court has repeatedly held that a state's aggravating factors must furnish the sentencer with "clear and objective standards" that provide "specific and detailed guidance." *Lewis v. Jeffers*, 110 S.Ct. at 3099; *Godfrey v. Georgia*, 446 U.S. at 428; *Gregg v. Georgia*, 428 U.S. 153, 198 (1976); *Proffitt v. Florida*, 428 U.S. 242, 253 (1976).[4]

Thus, where a state court has articulated a limiting construction of a facially unconstitutional aggravating factor which requires proof of some fact or circumstance capable of objective determination, the Court has held the limiting construction constitutional. *See Walton v. Arizona*, 497 U.S. 639, 110 S.Ct. 3047, 3057-3058 (1990)

[4] The requirement of objective guidance has deep roots in this Court's due process precedents as well. When a state statute contains no terms "susceptible of objective measurement," containing no reference to "a specific or definite act," the Court has declared the statute unconstitutionally vague under the due process clause. *See, e.g., Cramp v. Board of Public Instruction*, 368 U.S. 278, 286 (1961); *Champlin Refining Co. v. Corporation Commission of Oklahoma*, 286 U.S. 210, 243 (1932), *overruled on other grounds, Phillips Petroleum v. State of Oklahoma*, 340 U.S. 190 (1950); *United States v. L. Cohen Grocery Co.*, 255 U.S. 81, 89 (1921).

(upholding limiting construction of facially invalid "especially heinous, cruel or depraved" aggravating factor where it had been meaningfully narrowed by reference to the infliction of mental anguish or physical abuse, relishing the murder or showing indifference to the victim's suffering); *Godfrey v. Georgia*, 446 U.S. at 430-431 (upholding limiting construction of aggravating factor when narrowed by reference to torture, aggravated battery or serious physical abuse); *Proffitt v. Florida*, 428 U.S. at 255-256 (upholding limiting construction of "heinous, atrocious or cruel" aggravating factor when it had been narrowed by reference to torture).[5]

On the other hand, where an aggravating factor (or its limiting construction) does not require proof of some fact capable of objective determination, this Court has not hesitated to hold the aggravating factor unconstitutional. *See Shell v. Mississippi*, —— U.S. ——, 111 S.Ct. 313 (1990) (invalidating Mississippi's "especially heinous and atrocious" aggravating factor where the state's limiting construction did not require proof of any fact capable of objective determination); *Maynard v. Cartwright*, 486 U.S. at 364-365 (rejecting Oklahoma's "especially heinous, atrocious or cruel" aggravating factor where state courts did not require proof of any particular fact); *Godfrey v. Georgia*, 446 U.S. at 428-433 (rejecting Georgia Supreme Court's finding of "outrageously or wantonly vile" aggravating factor where state court did not require proof of any particular fact).[6]

---

[5] The federal circuits are in accord. *See, e.g., Boggs v. Bair*, 892 F.2d 1193, 1197 (4th Cir. 1989) (upholding limiting construction of aggravating factor narrowed by reference to aggravated battery beyond that inherent in the murder itself), *cert. denied*, 495 U.S. 940 (1990); *Proffitt v. Wainwright*, 685 F.2d 1227, 1263 (11th Cir. 1982) (upholding limiting construction of aggravating factor narrowed by reference to torture).

[6] *Accord, Moore v. Clarke*, 904 F.2d 1226, 1229-1233 (8th Cir. 1990), *opinion denying petition for rehearing*, 951 F.2d 895, 897-898 (invalidating Nebraska's entirely subjective limiting definition

Indeed, this Court has made clear that the requirement of objective criteria applies even where the entity finding the aggravating factor is a state reviewing court. Thus, where an aggravating factor (or its limiting construction) does not furnish the sentencer with the type of objective guidance *Godfrey* requires, a state reviewing court can "cure" the error. To do so, however, the reviewing court must have articulated some circumstance capable of objective determination which is necessary to establish the aggravating factor. *Maynard v. Cartwright*, 486 U.S. at 360-364; *Godfrey v. Georgia*, 446 U.S. at 428-433. *See also Clemons v. Mississippi*, 494 U.S. 738, 110 S.Ct. 1441, 1454 (1990) (Blackmun, J., concurring). Where the reviewing court has never held that any particular fact was necessary to establish the aggravating factor, but has simply looked at the circumstances surrounding each crime in determining if the aggravating factor was properly found, its finding of sufficient evidence to support the aggravating factor will not cure the error because it does not provide a principled way to distinguish those cases in which the death penalty is imposed from those in which it is not. *Maynard v. Cartwright*, 486 U.S. at 364; *Godfrey v. Georgia*, 446 U.S. at 433. *See also Clemons v. Mississippi*, 110 S.Ct. at 1453-1454 (1990) (Blackmun, J., concurring).

In *Maynard v. Cartwright*, 486 U.S. 356, for example, the Court held unconstitutional a limiting construction of an Oklahoma aggravating factor which did not require proof of any particular fact or circumstance. There,

---

of "especially heinous, atrocious or cruel" because it "does not cure the lack of objective standards" in the aggravating factor itself), *cert. denied*, —— U.S. —— (1992); *Newlon v. Armontrout*, 885 F.2d 1328, 1334 (8th Cir. 1989) (aggravating factors must be "capable of objective determination"), *cert. denied*, —— U.S. ——, 110 S.Ct. 3301 (1990); *Cartwright v. Maynard*, 822 F.2d 1477, 1491 (10th Cir. 1987) (invalidating Oklahoma's "heinous, atrocious and cruel" aggravating factor because it was not "a factor . . . capable of objective determination"), *aff'd*, 486 U.S. 356 (1988).

defendant was sentenced to death, in part, based on the sentencer's finding that the killing was "heinous, atrocious, or cruel." In prior cases, the Oklahoma courts had looked at a number of different circumstances as sufficient to uphold a finding of this aggravating circumstance, including "the attitude of the killer, the manner of the killing, and the suffering of the victim . . . ." 486 U.S. at 360. Significantly, however, as this Court noted, the Oklahoma courts had " 'refused to hold that any one of those factors *must* be present for a murder to satisfy this aggravating circumstance.' Rather, the Oklahoma court simply had reviewed all of the circumstances of the murder and decided whether the facts made out the aggravating circumstance." 486 U.S. at 360 (citations omitted).

The Court first held that the language of the aggravating factor itself did not provide the type of guidance required by the Eighth Amendment.[7] The state then argued that although the Oklahoma reviewing courts had never required that any particular fact or circumstance must be present to establish the aggravating factor, the reviewing court's finding of sufficient evidence to support the aggravating factor cured any error. The state argued that it was permissible to simply review all the circumstances around the crime and determine if the crime was "heinous, atrocious or cruel." 468 U.S. at 364. This Court explicitly repudiated this approach, "plainly reject[ing] the submission that a particular set of facts surrounding a murder, however shocking they might be, were enough in themselves, and without some narrowing principle to apply to those facts, to warrant the imposition of the death penalty." *Maynard v. Cartwright*, 486 U.S. at 363. *Accord Godfrey v. Georgia*, 446 U.S. at 429-433. The Court went even further and expressed approval of a limiting construction which would require "some kind of torture or physical abuse." 486 U.S. at 364-365.

[7] The jury had been given a limiting instruction:

> The term 'heinous' means extremely wicked or shockingly evil; 'atrocious' means outrageously wicked and vile; 'cruel' means pitiless, or designed to inflict a high degree of pain, utter indifference to, or enjoyment of, the sufferings of others.

Cartwright v. Maynard, 822 F.2d at 1488, n.6.

Petitioner suggests that requiring aggravating factors to provide objective guidance would impinge on the discretion of states to administer their capital punishment statutes. Pet. Br. at 17. Petitioner is wrong. In fact, state courts throughout the country have long embraced this precise requirement. For example, in *Arnold v. State*, 236 Ga. 534, 224 S.E.2d 386 (1976) the Georgia Supreme Court held that an aggravating circumstance which required "a substantial history of serious assaultive criminal convictions" was unconstitutional precisely because it did not contain even a minimal reference to some objective criteria:

> Whenever a statute leaves too much room for personal whim and subjective decision-making without a readily ascertainable standard or minimal objective guidelines for its application, it cannot withstand constitutional scrutiny.

224 S.E.2d at 381.

The Supreme Courts of Louisiana, Delaware, Connecticut, Colorado and Arkansas have also held that to withstand constitutional scrutiny, an aggravating factor must provide "minimal, objective guidelines sufficiently distinct to administer the law impartially . . . . [A]n aggravating circumstance which fails to provide such clear and objective standards cannot withstand constitutional scrutiny." *State v. David*, 468 So.2d 1126, 1128-1129 (La. 1985), *cert. denied*, 476 U.S. 1130 (1986). *Accord State v. Sonnier*, 402 So.2d 650, 647-658 (La. 1981), *cert. denied*, 463 U.S. 1229 (1983); *State v. English*, 367 So.2d 815, 823 (La. 1979); *Re Petition of State for Writ of Mandamus*, 433 A.2d 325, 326 (Del. 1981); *State v. White*, 395 A.2d 1082, 1090-1091 (Del.

1978); *State v. Breton*, 562 A.2d 1060, 1066 (Conn. 1989) (although aggravating factor requiring an "especially cruel" murder was invalid because it imposed a "subjective standard," limiting construction requiring torture rendered it constitutional because such was "an objective judicial gloss"); *People v. Davis*, 794 P.2d 159, 186 (Colo. 1990) (in order to serve their constitutionally required purpose, aggravating factors must be "capable of objective determination . . . ."), *cert. denied*, —— U.S. ——, 111 S.Ct. 662 (1991); *Wilson v. State*, 295 Ark. 682, 751 S.W.2d 734, 738 (1988), *modified*, 295 Ark. 692, 752 S.W.2d 761 (1988).

Similarly, for many years state courts throughout the country have been narrowing facially invalid aggravating factors by requiring proof of some fact or circumstance capable of objective determination. *See, e.g., State v. Wood*, 648 P.2d 71, 85-86 (Utah 1982) (narrowing "ruthlessness and brutality" aggravating factor to require torture or aggravated battery), *cert. denied*, 459 U.S. 988 (1982); *State v. Rook*, 304 N.C. 201, 283 S.E.2d 732 (1979) (in order to avoid claim of subjectivity, court narrows "heinous, atrocious and cruel" aggravating factor to require torture), *cert. denied*, 455 U.S. 1098 (1982); *State v. Brogdon*, 457 So.2d 616 (La. 1984) (same), *cert. denied*, 471 U.S. 1111 (1985); *Hance v. State*, 254 Ga. 856, 268 S.E.2d 339 (1980), *cert. denied*, 449 U.S. 1067 (1980).

Thus, not only have this Court's own precedents recognized that some reference to a circumstance capable of objective determination is the linchpin of the Eighth Amendment, but the federal courts of appeals and the state courts have long reached the same conclusion. Without such a reference, an aggravating factor cannot fulfill its constitutionally required goals.

2. *The* Osborn *construction of the "utter disregard" aggravating factor contains no reference to any circumstance capable of objective determination and is unconstitutional.*

In this case, the Idaho Supreme Court defined the "utter disregard" aggravating factor as "reflective of acts or circumstances surrounding the crime which exhibit the highest, the utmost, callous disregard for human life, i.e., the cold-blooded, pitiless slayer." *State v. Osborn*, 631 P.2. at 200-201. The first part of *Osborn's* definition—requiring "the highest, the utmost, callous disregard for human life"—does not solve the fundamental vagueness problem in this case. Replacement of the word "utter" with the synonyms "highest" and "utmost" simply restates the language of the statute. As such, it provides no more guidance than the language of the statute itself. *See Maynard v. Cartwright*, 486 U.S. at 364 (addition of the word "especially" to the term "heinous" does not cure vagueness problem); *Godfrey v. Georgia*, 446 U.S. at 428-429 (addition of the phrase "outrageously or wantonly" to the term "vile" does not cure vagueness problem). "Vague terms do not suddenly become clear when they are defined by reference to other vague terms." *Cartwright v. Maynard*, 822 F.2d at 1489.

Nor does the remainder of the *Osborn* reformulation—the terms "callous," "cold-blooded" or "pitiless"—add any element of objectivity to *Osborn*'s formulation. Thus, and with admirable candor, petitioner concedes that the *Osborn* formulation does not require proof of any particular facts before an utter disregard finding may be made but, instead, relies on the sentencer to look at the circumstances of each case and decide whether utter disregard has been established:

> [The *Osborn* construction] does not make findings of the aggravating factor[] depend on the presence of particular facts. Instead, Idaho has chosen to rely on the ability of the sentencing judge to make principled

> distinctions between capital and non-capital cases with guidance that is somewhat subjective . . . .

Pet.Br. at 9. Petitioner argues that the *Osborn* formulation presents a "subjective but workable statutory definition . . . ." Pet.Br. at 17.

Respondent's concession that the *Osborn* formulation "does not make findings of the aggravating factor[] depend on the presence of particular facts" brings this case squarely within *Cartwright*, *Godfrey* and *Clemons*. As in each of those cases, Idaho does not require proof of any particular fact in order to establish the utter disregard aggravating factor. Instead, pursuant to the precise language in *Osborn*, the sentencer may rely on the entirety of the "acts and circumstances surrounding the crime" in order to narrow the scope of the utter disregard aggravating factor. As the Tenth Circuit noted in this exact context:

> We agree that all of the circumstances surrounding a murder must be examined to determine whether the murder was 'especially heinous, atrocious, or cruel,' but there must be some objective standard that specifies which circumstances support such a determination. Consideration of all the circumstances is permissible; reliance upon all of the circumstances is not.

Cartwright v. Maynard, 822 F.2d at 1491, *aff'd*, 486 U.S. 356. Idaho's approach to its utter disregard aggravating factor is precisely what *Cartwright*, *Godfrey* and *Clemons* forbid.

In support of its position that it is constitutional to define an aggravating factor without requiring proof of any particular fact, but solely by reference to subjective criteria, petitioner relies on *Walton v. Arizona*, 497 U.S. 639, 110 S.Ct. 3047. There, the Court addressed the constitutionality of Arizona's "especially heinous, cruel or depraved" aggravating circumstance. Arizona had defined "cruel" to require the infliction of mental anguish

or physical abuse before the victim's death, including a victim's uncertainty as to his ultimate fate. 110 S.Ct. at 3057-3058. The Court held that this limiting definition was "virtually identical" to the limiting construction it had approved in *Maynard v. Cartwright*, 486 U.S. 356 at 364-365, requiring "torture or physical abuse." *Walton v. Arizona*, 110 S.Ct. at 3058. In upholding the Arizona Supreme Court's limiting definitions of the "depraved" component of this aggravating factor, the Court repeatedly noted those aspects of the state's definition which required proof of criteria which could be objectively detemined:

> Nor can we fault the court's statement that a crime is committed in an especially 'depraved' manner when the perpetrator 'relishes the murder, *evidencing* debasement or perversion,' or '*shows* an indifference to the suffering of the victim and *evidences* a sense of pleasure' in the killing.

110 S.Ct. at 3058 (emphasis added). Petitioner argues that the limitation approved in *Walton* is "of precisely the same character as that provided by the Idaho Supreme Court's *Osborn* limiting construction." Pet. Br. at 15.

Petitioner is wrong. The critical distinction between the two constructions is that the construction approved in *Walton* requires *proof of circumstances capable of objective determination* which distinguish some murders from others. *Walton* specifically relied on this requirement in upholding the Arizona limiting construction. Some murders will involve facts showing that the defendant "*evidenc*[*ed*] debasement or perversion" or "*show*[*ed*] an indifference to the suffering of the victim and *evidenc*[*ed*] a sense of pleasure in the killing." Others will not. In the words of the Georgia Supreme Court, this requirement provides the "minimal objective guidelines" necessary in an aggravating factor. *Arnold v. State*, 224 S.E.2d at 391.

In sharp contrast to *Walton*, the phrases "cold-blooded," "callous" and "pitiless" do not provide these "minimal objective guidelines." As respondent concedes, these phrases do "not make findings of the aggravating factor[] depend on the presence of particular facts." Pet. Br. at 9. Moreover, as the Court of Appeals correctly held, these phrases fail to provide *any* substantive, objective guidance to the sentencer as to the circumstances under which the defendant has exhibited "utter disregard for human life" and those under which he has not. Is the sentencer's discretion meaningfully narrowed when it is allowed to sentence someone to die for being "cold-blooded"? By what objective criteria can a sentencer or a reviewing court distinguish a pitiless killing from one that is with pity? Indeed, it is difficult to imagine a first degree murder which is not "cold-blooded" or in which the defendant killed the victim *with* pity.

Petitioner seeks to buttress its position by relying on Florida's "cold-blooded" aggravating factor. Pet.Br. at 15-16. This reliance is fundamentally misplaced. In fact, an analysis of the Florida cases applying the "cold-blooded" aggravating factor show that Florida has repeatedly recognized that such an aggravating factor requires a limiting definition referring to facts capable of objective determination.

Florida statutes section 921.142(5)(i) provides that a death penalty may be imposed if the sentencer finds the murder was committed in a "cold, calculated and premeditated manner without pretense of moral or legal justification." In order to insure that this factor serves a proper narrowing function, however, the Florida Supreme Court has long made clear that it may *not* be applied absent proof of "heightened premeditation" showing that the defendant planned or arranged to commit murder before the crime began. *McKinney v. State*, 579 So.2d 80, 85 (Fla. 1991); *Rogers v. State*, 511 So.2d 526, 533 (Fla. 1987), *cert. denied*, 484 U.S. 1020 (1988). In

the absence of evidence showing that defendant planned the murders before the crime began, the Florida Supreme Court has routinely held that this factor cannot apply.[8] It will be upheld only when there is evidence of advance planning, such as a contract killing, showing that defendant planned the killings before the crime began.[9]

Contrary to petitioner's suggestion, the differences between Florida's "cold, calculated and premeditated" aggravating factor and Idaho's "utter disregard" aggravating factor are manifest. Florida has defined a "cold" killing by requiring proof of circumstances which are capable of objective determination. In contrast, and as petitioner concedes, Idaho has not required proof of any particular facts or circumstances to support this finding. Thus, the same term which Florida courts recognized *needed* a limiting definition actually *is* the limiting definition in Idaho. The Idaho analysis ends where the Florida analysis begins.

In the absence of a limiting construction like the one employed in Florida, the term "cold-blooded" could apply to every first degree murder. As Justice Huntley of the Idaho Supreme Court has recently noted in this exact context:

> What first degree murder fails to show 'callous disregard for human life?' I suppose this could be the 'pitiful' slayer who, prior to delivering the fatal blow,

---

[8] *See, e.g., McKinney v. State*, 579 So.2d at 85; *Amoros v. State*, 531 So.2d 1256, 1261 (Fla. 1988); *Harmon v. State*, 527 So.2d 182, 188 (Fla. 1988); *Brown v. State*, 473 So.2d 1260, 1268 (Fla. 1985), *cert. denied*, 474 U.S. 1038 (1985); *Herzog v. State*, 439 So.2d 1372, 1380 (Fla. 1983); *Cannady v. State*, 427 So.2d 723, 730-731 (Fla. 1983); *Mann v. State*, 420 So.2d 578, 580-581 (Fla. 1982), *cert. denied*, 469 U.S. 1181 (1985).

[9] *See, e.g., Ponticelli v. State*, 593 So.2d 483 (Fla. 1991) (applying factor where the "evidence establishes that these were execution-styl murders that were carefully planned bfor th crime began."); *Kelley v. State*, 486 So.2d 578, 586 (Fla. 1986), *cert. denied*, 479 U.S. 871 (1986); *Routly v. State*, 440 So.2d 1257, 1265 (Fla. 1983), *cert. denied*, 468 U.S. 1220 (1984).

> tells the victim: 'Excuse me, pardon me, I know it's inconvenient, but I must now take your life.'
> . . .
>
> [The utter disregard factor is] nothing more than [a] kitchen sink aggravating circumstance which enable[s] the state to make *every* first degree murderer not just a candidate for, but an actual recipient of the harshest and most final of all criminal penalties. As a result, the mandate to narrow the class of death-eligible murders is abandoned.

State v. Charboneau, 774 P.2d 299, 342 (Idaho 1989) (Huntley, J., concurring and dissenting). The Court of Appeals correctly held the *Osborn* construction unconstitutional.[10]

To be sure, as this Court has recently observed, "the proper degree of definition of an aggravating factor of this nature is not susceptible of mathematical precision . . . ." *Walton v. Arizona*, 110 S.Ct. at 3058. Thus, aggravating factors need not be defined in terms which are solely, or even predominantly, capable of objective determination.

The fact remains, however, that in order for an aggravating factor to serve its constitutional purpose of "distinguishing the few cases in which [the death penalty] is imposed from the many cases in which it is not," "minimizing the risk of wholly arbitrary and capricious action," and "mak[ing] rationally reviewable the process

[10] In disagreeing with this result below, Judge Trott observed that the *Osborn* construction points out certain facts which will *not* support a finding of utter disregard. *Creech v. Arave*, 947 F.2d at 889. While this observation is accurate, it does not solve the vagueness problem at issue. This Court has long made clear that in order to survive a vagueness challenge, a penal statute must define the conduct which *does* come within its reach. *See, e.g., Cline v. Frink Dairy Co.*, 274 U.S. 445, 459 (1927); *Connally v. General Construction Co.*, 269 U.S. 385, 391 (1926). There is no authority for the remarkable proposition that a penal statute can survive a vagueness challenge by defining the conduct which does *not* come within its reach.

for imposing a sentence of death," it is essential that the factor contain a reference to, and require proof of, some circumstance capable of objective determination. Pursuant to this Court's capital jurisprudence, and as state supreme courts throughout the country have long recognized, absent some requirement of such a fact or circumstance, an aggravating factor cannot fulfill its constitutionally required goals.

B. Idaho Cases Establish That The Utter Disregard Aggravating Factor Provides No Guidance To The Sentencer.

Placing the language of the *Osborn* formulation aside, petitioner argues that "[t]he best evidence that Idaho's utter disregard factor is not so broad that it operates simply as a catch-all for murders not covered by other aggravating circumstances lies in the fact that the utter disregard circumstance has been applied in a narrow, consistent fashion." Pet.Br. at 24-25. Petitioner then analyzes those opinions in which the utter disregard factor has been applied and suggests that those opinions furnish constitutionally adequate guidance. Pet.Br. at 25-28.

Petitioner may be arguing that these cases show that the Idaho Supreme Court's finding of sufficient evidence to support the aggravating factor cured any error in sentencing. Alternatively, and recognizing that this case will be returned to the Idaho courts for resentencing pursuant to the Court of Appeals' decision on other issues upon which Mr. Creech prevailed, petitioner may be arguing that these cases *now* provide sufficient guidance to the sentencer. *See Sochor v. Florida*, —— U.S. ——, 112 S.Ct. 2114, 2121 (1992) (trial court is presumed to be aware of state supreme court applications of aggravating factors). Both arguments must be rejected.[11]

[11] Petitioner cannot be arguing that these cases could have somehow guided the sentencer in this case. At the time of both the

Petitioner analyzes the Idaho cases and posits six different circumstances under which the utter disregard factor exists: 1) a "planned murder for no good reason," 2) "the senseless and unprovoked murder of children," 3) a killing in which the defendant waited for his victim, 4) a killing where defendant shot at numerous people, 5) "wholly gratuitous killings of multiple victims," and 6) a calm murder after which the defendant refused to render medical aid to the victim. Pet.Br. at 25-26. Consistent with its concession that *Osborn* "does not make findings of the aggravating factor[] depend on the presence of particular facts," however, petitioner does not argue that the Idaho cases require any particular fact be established in order to sustain an utter disregard finding.

In fact, the Idaho Supreme Court has *never* suggested that any of the six circumstances proposed by petitioner must be present to establish utter disregard. The Idaho Supreme Court has found the utter disregard factor present where:

January 1982 and March 1983 sentencing hearings, no Idaho case had ever applied the utter disregard aggravating factor. While the trial court may be "presumed to know the law and to apply it in making [its] decision," *Walton v. Arizona*, 110 S.Ct. at 3057, it is untenable to presume that the trial court was aware of applications which occurred years *after* the actual sentencing. *See Smith v. Goguen*, 415 U.S. at 571, n.6 and 575 (in addressing a vagueness challenge to a state statute, courts must look at judicial interpretations of the statute at the time it is applied); *Lanzetta v. New Jersey*, 306 U.S. 451, 456 (1939) (same). *See also Walton v. Arizona*, 110 S.Ct. at 3067 (Scalia, J., concurring) (standards to guide sentencer's discretion must be "establish[ed] in advance.") Under these facts, Idaho Supreme Court opinions published *after* the sentencing hearing cannot rationally be held to have provided some type of guidance to the sentencer.

- The killing was "planned for no good reason" and where it was spontaneous.[12]
- The killing involved children and where it involved adults.[13]
- The defendant waited for his victim and where he did not have to wait.[14]
- The defendant shot at numerous people and where he simply shot at his victim.[15]
- The killing involved multiple victims and where it involved only one victim.[16]
- The killer was unprovoked and acted calmly in killing the victim or where he acted out of provocation in a fit of rage.[17]

The Idaho Supreme Court's "refus[al] to hold that any one of those factors *must* be present for a murder to satisfy this aggravating factor," *Cartwright v. Maynard*, 486 U.S. at 360, and petitioner's concession that the

---

[12] *See, e.g., State v. Fetterly*, 710 P.2d 1202 (Idaho 1985) (murder planned 3 days in advance), *cert. denied*, 479 U.S. 870 (1986); *State v. Paz*, 798 P.2d 1 (Idaho 1990) (murder not planned in advance), *cert. denied*, —— U.S. ——, 111 S.Ct. 375 (1990).

[13] *See, e.g., State v. Aragon*, 690 P.2d 293 (Idaho 1984) (child victim); *State v. Fain*, 774 P.2d 252 (Idaho 1989) (same), *cert. denied*, 493 U.S. 917 (1989); *State v. Fetterly*, 710 P.2d 1202 (adult victim); *State v. Lankford*, 781 P.2d 197 (Idaho 1989) (same), *cert. denied*, —— U.S. ——, 110 S.Ct. 423 (1990).

[14] *See, e.g., State v. Fetterly*, 710 P.2d 1202 (waiting for victim); *State v. Paz*, 798 P.2d 1 (no waiting).

[15] *See, e.g., State v. Paz*, 798 P.2d 1 (numerous people); *State v. Osborn*, 663 P.2d 1111 (Idaho 1983) (shot victim alone).

[16] *See, e.g., State v. Pizzuto*, 810 P.2d 680 (Idaho 1991) (multiple victims), *cert. denied*, —— U.S. ——, 112 S.Ct. 1268 (1992); *State v. Fetterly*, 710 P.2d 1201 (single victim).

[17] *See, e.g., State v. Pizzuto*, 810 P.2d 680 ("unprovoked" killing which was "not out of rage"); *State v. Aragon*, 690 P.2d 293 (calm); *State v. Creech*, 670 P.2d 463 (provoked killing in a violent rage).

Osborn construction "does not make findings of the aggravating factor[] depend on the presence of particular facts," are fatal to petitioner's argument that the Idaho aggravating factor provides the type of guidance required by the Eighth Amendment.

Indeed, as petitioner's analysis of the Idaho cases confirms, rather than require that any particular fact be present in order to establish utter disregard, and rather than applying the utter disregard factor by identifying and relying upon a limiting principle, the Idaho Supreme Court appears to rely on the circumstances of each case to sustain the finding.[18] This is precisely what *Maynard v. Cartwright* and *Clemons v. Mississippi* forbid. In fact, the Idaho Supreme Court has *never* reversed an utter disregard finding.[19] *See Clemons v. Mississippi*, 110 S.Ct. at 1455 (Blackmun, J., concurring.)

Nevertheless, petitioner argues that the Idaho Supreme Court's applications of the utter disregard factor show that it has been used in a "narrow, consistent fashion." Pet.Br. at 24-25. Petitioner's current proposal is that utter disregard factor has been limited to situations in which "the defendant acted with no significant provoca-

---

[18] *See, e.g., State v. Lankford*, 747 P.2d 710, 725 (Idaho 1987), *vacated on other grounds, Lankford v. Idaho*, —— U.S. ——, 111 S.Ct. 1723 (1991); *State v. Beam*, 710 P.2d 526, 534 (Idaho 1985); *State v. Paradis*, 676 P.2d 31, 40 (Idaho 1984), *cert. denied*, 468 U.S. 1220 (1984); *State v. Gibson*, 675 P.2d 33, 42 (Idaho 1983), *cert. denied*, 468 U.S. 1220 (1984).

[19] Petitioner suggests that *State v. Charboneau*, 774 P.2d 299 (Idaho 1989) was such a case. Pet. Br. at 27. Petitioner is wrong. The *Charboneau* court remanded the case because there was insufficient evidence to support a *nonstatutory* aggravating factor upon which the trial court had relied. 774 P.2d at 321-324. In light of this remand, the court explicitly noted that "it is unnecessary for us to consider at this time whether the evidence supports a finding of either statutory aggravating circumstance under I.C. section 19-2515(g)(5) and (6)." 774 P.2d at 324.

tion, without emotion or killed for mere convenience such as to destroy a witness to a crime." Pet.Br. at 25.[20] Contrary to petitioner's suggestion, however, the Idaho Supreme Court has never articulated a construction of the utter disregard factor which limited it to these situations.[21]

In any event, petitioner's most recent thesis is wrong. The fact that "defendant acted with no significant provocation, without emotion or killed for mere convenience such as to destroy a witness to a crime" is neither necessary nor sufficient to justify a finding of utter disregard. *Compare State v. Searcy*, 798 P.2d 914, 921 (Idaho 1990) (trial court does not find utter disregard where defendant kills a witness to a robbery without provocation or emotion) *with State v. Creech*, 670 P.2d 463 (trial court does find utter disregard where killing was provoked by a deadly attack, where killing was with great emotion, and where the victim was not a witness to any crime).

Indeed, an analysis of those cases which focus upon the presence of provocation not only undermines petitioner's claim of consistent application, but goes further and il-

---

[20] Petitioner's definition of the factor has changed dramatically over the years. On direct appeal to the state supreme court, petitioner argued that the utter disregard factor applied to defendants who did "not possess the normal restraints against committing murder, but nonetheless do[] not do so sadistically or with torture," to the person "who is not affected by the moral precept that it is wrong to commit murder," and to murders "which are particularly inexcusable." Respondent's Brief on Direct Appeal at 34-35.

In this Court, petitioner has totally changed its definition, explaining that utter disregard is a killing where the defendant acted with "no significant provocation, without emotion or killed for mere convenience such as to destroy a witness to a crime." Pet. Br. at 25.

[21] Petitioner's focus on "significant provocation" is in itself troubling. Under Idaho law, a homicide committed under significant provocation is not first degree murder, but manslaughter. Idaho Code Section 18-4006. Thus, petitioner's suggested limitation on the utter disregard factor is illusory: it would only apply where defendant could not be convicted of first degree murder and sentenced to death to begin with.

lustrates the extraordinary breadth of the *Osborn* construction. In *State v. Aragon*, 690 P.2d 293, the court upheld an utter disregard finding because it was:

> supported by evidence that appellant acted calmly, yet violently, and refused to render aid to the victim, even though given several opportunities, and even though it was obvious the victim was in mortal peril. His only concern was to cover up his own participation in the incident.

690 P.2d at 302. *See also State v. Pizzuto*, 810 P.2d at 712 (in upholding utter disregard finding, court notes that the killing was "not out of rage" and was "unprovoked").

These cases show that petitioner's latest interpretation of the *Osborn* construction is illusory. It is present when a defendant kills "calmly" and "not out of rage" and when he kills in an "excessive violent rage." It is present when a defendant's actions are completely unprovoked and when the defendant kills in response to an unprovoked attack. It is present when a defendant refuses to refer medical aid to the victim and when he does refer medical aid to the victim. It is present when a defendant tries to cover-up his own participation in the murder and when he immediately confesses to the crime.

In the final analysis, however, it is unnecessary to compare different cases to prove that the *Osborn* limitation is without meaning. At least one trial court has recently applied *Osborn* to the same facts twice, with precisely the same record, and come up with two completely different results: once finding the utter disregard factor and once not. *Compare State v. Leavitt*, 775 P.2d 599, 608 (Idaho 1989) (finding utter disregard), *cert. denied*, 493 U.S. 923 (1989) *with State v. Leavitt*, 822 P.2d 523, 524 (Idaho 1991) (not finding utter disregard). It is difficult to imagine a clearer example of how little guidance the *Osborn* formulation really provides.

C. Under Any Interpretation, There is Insufficient Evidence To Support The Utter Disregard Aggravating Factor In This Case.

Even assuming *arguendo* that petitioner is correct in contending that the utter disregard factor is only applied when the defendant has acted "with no significant provocation, without emotion or killed for mere convenience such as to destroy a witness to a crime," and that the state courts in this case were somehow aware of this limitation, there is insufficient evidence to support reliance on this factor.

As this Court has recently made clear, where state courts have supplied a proper limiting construction to a facially invalid aggravating circumstance, and have applied it to the facts presented, reliance on the aggravating circumstance is still improper when the facts are insufficient to prove, beyond a reasonable doubt, that the limiting construction has been met. *Lewis v. Jeffers*, 110 S.Ct. at 3103-3104. *See Jackson v. Virginia*, 443 U.S. 307 (1979). As the Court of Appeals correctly held, this is precisely the situation in this case.

The trial court found that "the defendant did not instigate the fight with the victim, but the victim, without provocation, attacked [defendant]." (JA 52.) In fact, the uncontradicted record shows that the victim attacked Mr. Creech with a sock full of batteries and, moments later, with a razor blade attached to a toothbrush. (RT 1984 at 15-20, 26-27, 29-32.) During this unprovoked assault, the victim cut Mr. Creech's arms, face and stomach. (RT 1984 at 31-32.) The trial court itself concluded that Mr. Creech was justified in defending himself but found that Mr. Creech's actions went beyond legitimate self-defense, reflecting the fact that Mr. Creech was in an "excessive violent rage." (JA 52.) Moreover, immediately after the fight, Mr. Creech referred medical aid to the victim. (ER 156; RT 1984 at 34.)

In arguing that a reasonable sentencer would nevertheless find that Mr. Creech acted with *no* significant provocation, petitioner argues that the trial court's findings of mitigation were "generous." Pet.Br. at 31. Petitioner ignores the fact that the Idaho Supreme Court reviewed the record and held "that the evidence at the sentencing hearing clearly supports the trial court's findings of . . . mitigating circumstances." *State v. Creech*, 670 P.2d at 470.

Petitioner also argues that "Creech engineered an attack on [sic] Dale Jensen in order to create a pretext for killing him" and that the trial court "viewed the attack by Jensen as something that served Creech as a mere pretext for the killing." Pet.Br. at 30 and 31, n.6. The state courts have repeatedly rejected this very argument. Indeed, the Idaho Supreme Court explicitly noted that the trial court "did not decide or find that the murder had been performed on contract or by plan." *State v. Creech*, 670 P.2d at 465. In fact, the trial court not only found that Jensen's attack was "unprovoked," but it went further and found that the unprovoked attack actually constituted a *mitigating* factor. (JA 52.)

Finally, petitioner argues that Mr. Creech's prior homicide convictions establish that in responding to Jensen's unprovoked attack in this case, Mr. Creech acted "with no significant provocation, without emotion or killed for mere convenience such as to destroy a witness to a crime." Pet.Br. at 30. This argument must be rejected: Mr. Creech's prior record was introduced to prove and was relevant to the section 19-2515(g)(8) "propensity" aggravating factor.[22] Because the "propensity" aggravating factor focuses on the defendant's background and potential for future dangerousness, it has nothing whatever to do with whether the "acts or circumstances surrounding the crime" reflect an utter disregard for human life.

[22] Section 19-2515(g)(8) provides that it is an aggravating factor if the defendant "has exhibited a propensity to commit murder which will probably constitute a continuing threat to society."

On this record, there is simply insufficient evidence upon which a rational factfinder could find beyond a reasonable doubt either "acts or circumstances surrounding the crime which exhibit the highest, the utmost, callous disregard for human life, i.e., the cold-blooded, pitiless slayer," *State v. Osborn*, 631 P.2d at 200-201, or that Mr. Creech killed Jensen "with no significant provocation, without emotion." Pet.Br. at 25. This was not a "cold-blooded, pitiless" killing done without provocation or emotion, it was a killing done in an "excessive, violent rage" arising out of an unprovoked, deadly assault *by the victim himself*. While the trial court found that Mr. Creech went beyond what hindsight proved to be legitimate self-defense, the fact remains that it was the victim's unprovoked and deadly assault which initiated the fight. Mr. Creech's actions in this case were not those of a calm, calculating killer; they were those of a man subject to an unprovoked and deadly attack. Because the record of this case will not support a finding that Mr. Creech was acting "with no significant provocation [or] without emotion," the utter disregard aggravating factor was inapplicable to this case.

D. Because The Idaho Supreme Court Did Not Engage In Harmless Error Analysis Or Appellate Reweighing, A Remand Is Required.

Finally, petitioner argues that the Idaho Supreme Court's review of this case cured any "deficiency in the way sentence was imposed in the trial court." Pet.Br. at 17-24. This argument must be rejected because it ignores the nature of the Idaho capital punishment scheme as well as the scope of the appellate review performed in this case.

When a state uses aggravating circumstances solely to distill death-eligible murders from all first degree mur-

ders, and does not require the sentencer to balance aggravating factors against mitigating factors, reliance on an unconstitutional aggravating factor does not require a remand where at least one valid aggravating circumstance remains. *Zant v. Stephens*, 462 U.S. at 873-874. Where the state scheme also uses aggravating circumstances to guide the sentencer's discretion in deciding what penalty to impose, as where the sentencer is required to weigh any mitigating factors against the aggravating factors, reliance on an unconstitutional aggravating circumstance requires a remand. *Cartwright v. Maynard*, 822 F.2d at 1480, 1482-1483.

To be sure, in such "weighing states" a state appellate court may avoid the need for a remand, and uphold a death sentence which was based on an unconstitutional aggravating factor, in either of two ways. First, it may disregard the invalid aggravating factor and engage in "careful appellate weighing of aggravating against mitigating circumstances." *Clemons v. Mississippi*, 110 S.Ct. at 1446-1449. *Accord Stringer v. Black*, —— U.S. ——, 112 S.Ct. 1130, 1137 (1992). Alternatively, it may disregard the invalid aggravating factor and apply harmless error analysis. *Sochor v. Florida*, 112 S.Ct. at 2122-2123; *Stringer v. Black*, 112 S.Ct. at 1137; *Clemons v. Mississippi*, 110 S.Ct. at 1450-1451.

These alternatives arise out of the "well-established Eighth Amendment requirement of individualized sentencing determinations in death penalty cases." *Stringer v. Black*, 112 S.Ct. at 1136. In light of this fundamental Eighth Amendment requirement, an appellate court in a weighing state may *not* affirm a death sentence by relying on an unconstitutional aggravating factor:

> In a weighing State . . . there is Eighth Amendment error when the sentencer weighs an 'invalid' aggravating circumstance in reaching the ultimate decision to impose a death sentence. Employing an invalid aggravating factor in the weighing process 'creates the possibility . . . of randomness,' by placing a 'thumb [on] death's side of the scale,' thus 'creat[ing] the risk [of] treat[ing] the defendant as more deserving of the death penalty.' Even when other aggravating factors exist as well, merely affirming a sentence reached by weighing an invalid aggravating factor deprives a defendant of 'the individual treatment that would result from actual reweighing of the mix of mitigating factors and aggravating circumstances.'

Sochor v. Florida, 112 S.Ct. at 2119 (citations omitted). The procedure forbidden in *Sochor* is exactly what happened in this case.

Here, Idaho Code Section 19-2515(c) provides that where a trial court has found that a statutory aggravating factor exists, "the court shall sentence the defendant to death unless the court finds that mitigating circumstances which may be presented outweigh the gravity of any aggravating circumstance found . . . ." *See also* Idaho Code Section 19-2515(e) (requiring a written statement of reasons where "the court finds that mitigating circumstances outweigh the gravity of any aggravating circumstances found . . . .") Thus, like Oklahoma, Florida and Mississippi, Idaho is a "weighing state." [23]

Because the Idaho Supreme Court believed *Osborn* was a proper limiting construction, it did not disregard the utter disregard factor and engage in either appellate re-

---

[23] Without discussion, petitioner asserts that "Idaho is not a weighing state as that term is defined in *Clemons v. Mississippi*, 494 U.S. 738 (1990)." Pet. Br. at 23. In light of Idaho Code Section 19-2515(c) and (e)—both requiring the trial court to weigh aggravating factors against mitigating factors—petitioner's assertion is plainly incorrect. *See Stringer v. Black*, 112 S.Ct. at 1136 (noting that Mississippi is a "weighing state" because the sentencer weighs aggravating circumstances against mitigating circumstances); *Parker v. Dugger*, —— U.S. ——, 111 S.Ct. 731, 738 (1991) (same conclusion with respect to Florida); *Clemons v. Mississippi*, 110 S.Ct. at 1446.

weighing or harmless error analysis. Thus, nothing in the review process cured the error. *Sochor v. Florida*, 112 S.Ct. at 2119; *Stringer v. Black*, 112 S.Ct. at 1137.

Contrary to petitioner's suggestion, the fact that the Idaho Supreme Court found that the evidence supported the trial court's utter disregard finding does not cure the error. Pet.Br. at 17-20. When a sentencer finds an aggravating factor to be present, and the state appellate court finds sufficient evidence to support this finding without ever applying a proper limiting construction of the factor, the sentencer's error has not been cured on appeal. *Stringer v. Black*, 112 S.Ct. at 1134-1137; *Maynard v. Cartwright*, 486 U.S. at 364; *Godfrey v. Georgia*, 446 U.S. at 429-433. If the *Osborn* construction applied by the actual sentencer is constitutionally insufficient, the Idaho Supreme Court's application of that same construction cannot cure the sentencer's error.

Alternatively, petitioner argues that the Idaho Supreme Court's proportionality review, in which it found the death sentence imposed on Mr. Creech to be proportionate with other cases, constitutes an analysis which renders any "deficiency in the way sentence was imposed in the trial court" of no import. Pet.Br. at 21-24. Not so. Where the sentencer in a weighing state has relied on a vague aggravating factor in imposing a death sentence, this Court has repeatedly vacated the death sentence notwithstanding the state supreme court's proportionality analysis. *See, e.g., Stringer v. Black*, 112 S.Ct. at 1134; *Clemons v. Mississippi*, 110 S.Ct. at 1446; *Godfrey v. Georgia*, 446 U.S. at 427. Indeed, as the Court has recently made clear, even when a state's proportionality review suggests it may have evaluated defendant's sentence in the absence of an invalid aggravating factor, it is no substitute for harmless error analysis. *Sochor v. Florida*, 112 S.Ct. at 2123 and 2123-2124 (O'Connor, J., concurring). This principle applies with even greater force here, where it is clear that in performing its proportionality review, the

Idaho Supreme Court *included* the unconstitutional utter disregard factor in its calculus.

On this record, petitioner's argument that the Idaho Supreme Court's review of this case cured the "deficiency in the way sentence was imposed in the trial court" must be rejected. While there are several techniques by which a state appellate court may uphold a death sentence when a sentencer has relied on an invalid aggravating factor, none were employed in this case. The Court of Appeals correctly held that a remand was the appropriate remedy for the sentencer's consideration of an unconstitutional aggravating factor in the weighing process that lead to death.

CONCLUSION

The Court of Appeals' decision should be affirmed.

Respectfully submitted,

CLIFF GARDNER *
GARDNER & DERHAM
900 North Point, Suite 450
San Francisco, CA 94109
(415) 922-9404

CLAUDE M. STERN
NOSSAMAN, GUTHNER, KNOX
& ELLIOTT
50 California Street, 34th Floor
San Francisco, CA 94111

* Counsel of Record